

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAMONT D. MCCLURE,

Defendant-Appellant.

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UNPUBLISHED

December 18, 2003

No. 242323

Wayne Circuit Court

LC No. 01-005893

Before: Schuette, P.J., and Murphy and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a jury trial, of second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was sentenced to thirty to fifty years' imprisonment on the murder conviction, three to five years' imprisonment on the felon in possession conviction, and two years' imprisonment on the felony-firearm conviction. We affirm.

**I. BASIC FACTS**

This case arises out of a fatal shooting shortly after midnight in a Coney Island restaurant in Detroit following an altercation between various individuals while patronizing the restaurant. We shall now summarize the relevant testimony of trial witnesses with respect to the circumstances that evolved around and at the time of the shooting.

Andre Miller testified that he went to the restaurant along with the victim Jonathan Miller and Jason Goodman to get something to eat.<sup>1</sup> Miller described the restaurant as having bullet-proof glass where you order your food and about four rows of booths to sit and eat. The victim, Miller, and Goodman ordered their food and the victim and Goodman sat down at a booth while Miller played a video game. At that point in time, there were a male and female sitting in a booth across from the victim and Goodman, and another male, described as a vagrant, was just standing around inside the restaurant. From his vantage point at the nearby video machine,

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<sup>1</sup> For purposes of clarity, Andre Miller shall be referred to as "Miller" in this opinion, and Jonathan Miller shall be referred to as the "victim."

Miller heard Goodman say: “What, you have a problem . . .” The statement was directed to the male and female in the adjacent booth. Miller testified that the male and female then left the restaurant. Miller identified the male as being defendant.

Ten minutes later, according to Miller, a tall, skinny, light-skinned black male (hereinafter “unknown male”) entered the restaurant followed immediately by defendant. Miller described defendant as having an “evil expression” on his face. Defendant, pointing to Goodman, stated: “Who’s with this whore-ass light skinned nigger right here?” Defendant then displayed a firearm. Goodman was still in the booth, and the victim had joined Miller over at the video machine. The unknown male then proceeded to punch Goodman in the mouth without saying a word. The unknown male struck approximately four blows as Goodman cowered. Miller stated that Goodman was unarmed. The unknown male then turned his attention to the victim all the while defendant was pointing and waving his gun. Miller moved toward a counter away from the victim.

As the victim and the unknown male engaged in a verbal exchange, defendant leaped on a chair in one of the booths and pointed his gun in the direction of the victim. Miller saw the unknown male and the victim start tussling, and Miller was able to run out the front door of the restaurant. As Miller ran toward the front door of the restaurant in his escape, he heard gunshots. Miller said that he heard the gunshots to his rear. But he did not look back because he feared that he was the target of the shooting. Outside the restaurant, Miller observed a wall which he jumped over and hid behind. He heard about three or four additional shots while hiding behind the wall. Miller testified that he then saw defendant and the unknown male exit the restaurant and drive away in a car. Miller indicated that the unknown male was now limping.

Miller subsequently reentered the restaurant and saw the victim lying on the floor with a gunshot wound to the head area and blood everywhere. Police soon arrived. A couple days later, Miller identified defendant from a police photograph. Miller was convinced that defendant had a gun the night of the crime and shot the victim.

On cross-examination, Miller admitted that he did not know exactly what was transpiring behind him as he ran out of the restaurant and heard the gunshots. On redirect, Miller testified that the only person he saw carrying a gun that night was defendant.

Michael Cooper, a member of the military, testified that he was also in the restaurant at the time of the shooting with a couple of his friends. Cooper did not know any of the individuals involved in the dispute and shooting at the restaurant. Cooper saw a short black male, 5’6” or so, enter the restaurant with a gun and then fire the weapon. Cooper stated that the gunshot struck the shooter’s friend, apparently the unknown male, because the person struck by the bullet stated: “Well, damn, you hit me.” And the shooter then stated to the victim: “You made me shoot my boy, you gotta’ catch one for that.” The shooter, according to Cooper, then pinned the victim between a door and the back of the restaurant and shot him. Cooper testified that defendant, on observation in the courtroom, looked familiar, but he could not be one-hundred percent certain.

Relevant to this appeal, Cooper testified as follows:

*Q.* Well, what about – are you afraid, now, Mr. Cooper?

A. No.

Q. Have you been threatened?

A. Yes, I have.

Q. How were you threatened, sir?

A. Um, I received a letter to my home. Well, my mother received a letter to her home on Friday, before I came in town. And a threat was made to an individual who knows my brother. And he, in turn, contacted my brother and told him.

Cooper testified that the in-court attempt to identify defendant was the first time he had been asked to identify defendant. Cooper did testify that he had been in the military and out of the country for a period of time before the trial; a six-month stint in Kosovo. Cooper further testified that the shooter's "friend" was a tall, light-skinned black male. Directly before the shooting, Cooper saw this tall male scuffling with another individual, not the shooting victim. Cooper stated that he did not see the shooter in the restaurant when the scuffle was occurring. He also testified that he saw no one leave the restaurant while the shooting was taking place.

A forensic pathologist testified that she conducted the autopsy on the victim, and that the victim suffered multiple gunshot wounds. The victim had been shot in the left forehead, the lower left leg, and the left calf.

Debra Elder testified that she was working at Coney Island at the time of the shooting. She stated that she saw a male, who was sort of tall, enter the restaurant and punch another guy. Subsequently, Elder saw a man holding a gun in the air. Elder told police that she had seen the man with the gun in the restaurant earlier with his girlfriend. Elder also told police that the man with the gun had a small build, although she denied at trial that she made such a statement to police. In her statement to police, Elder stated that she saw the man with the gun fire the weapon, and it looked like the bullet struck the ground near the victim's foot. Elder denied making such a statement to police. She did agree with police statements in which she indicated that the man who threw a punch was tall and did not have a gun. Elder was asked to look around the courtroom to see if she could identify anyone that was in the restaurant at the time of the shooting. She responded that no one looked familiar. Pertinent to this appeal, Elder testified as follows:

Q. Now, ma'am, did you bring me a letter, today?

A. Yes, I did.

Q. Where did you get that letter from?

A. From my daughter.

Q. And did that letter relate to your being here in court, today?

A. Yes, it did.

Q. Did that letter frighten you?

A. Not really.

Q. Why not?

A. Because, I – you know, I’m gonna get up here and tell the truth or leave it alone. And that’s what I’m here for, just to tell the truth.

Q. Where did that letter go to?

A. It came to my house.

Q. Do you know the people whose names are on that letter?

A. No, I don’t.

Q. Do you know how they would have gotten your address?

A. No, I don’t.

There was additional testimony presented by police officers, along with a stipulation regarding forensic evidence, that has little bearing on our analysis. We do note that police testimony indicated that there were footprints on the top of a table and a chair located in the restaurant. Pursuant to his constitutional rights, defendant chose not to testify at trial, nor did he make any statements to police. During the prosecutor’s closing rebuttal argument, he stated:

And you may be able to tell, but I was a little bit surprised by Ms. Elder’s testimony, today, that she’s taking back a lot of that stuff that she told the police that night. She said, “I didn’t tell them that, I didn’t tell them that.” Now, certain things she remembers, but unfortunately those have nothing to do with what this man looked like. Her memory is convenient. Why? She got a letter, just like Michael Cooper got a letter. Was she afraid? Well, I would be. She said, “No, I’m not afraid,” but her memory is convenient. She told the police a lot more that night, or at least the statement says that that she signed, than she’s willing to say here, today. Why is that? I’d submit it’s because she’s afraid, the same way Mr. Cooper told you he got a letter.

Now, why is somebody going to send them a threatening letter unless they’re afraid something bad is going to happen to them? Why would they do that?

Defense counsel then objected, arguing that there was “no showing it’s a threatening letter. We’re going way beyond the evidence.” The trial court then instructed the jury that

statements made by counsel are not evidence. The prosecutor made no further references to letters.<sup>2</sup>

After the jury was selected, but before trial testimony commenced, the prosecutor moved in limine to exclude any reference to a nervous breakdown allegedly suffered by Andre Miller shortly after the crime. The prosecutor informed the trial court that he received the information from Miller's mother who told him that Miller was hospitalized for about three weeks and prescribed medicine. Miller lived for a time in "a group-home type situation" but was no longer taking medicine or under a doctor's care. Miller currently lived with his mother and was receiving out-patient support. The prosecutor maintained that, because there no longer was any type of infirmity or medicine being taken, defendant should be precluded from exploring the matter during trial. The trial court declined to issue a ruling, taking the matter under advisement to be resolved when Miller testified if necessary. The record reflects that the issue was never again broached.

## II. ANALYSIS

### A. Ineffective Assistance of Counsel

Defendant first argues that trial counsel was ineffective for failing to object to the prosecutor's reference, during the questioning of Cooper and Elder, to threatening letters because evidence of the letters was inadmissible and prejudicial.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a

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<sup>2</sup> The jury did reflect its concern about the threats when it sent a note to the judge during deliberations, providing:

Due to the allegations of letters, can we request a 15-minute lapse between when we leave and the rest of the courtroom? Or, what kind of security can we expect on the way out?

probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

The record reflects that no letters were introduced or admitted into evidence. However, this did not preclude the prosecutor from inquiring about letters and threats when examining the witnesses who were subjected to the threats, and a sufficient foundation was laid.<sup>3</sup>

Evidence of a defendant’s threats against witnesses is generally admissible to show a consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). “A witness’ motivation for testifying is always of undeniable relevance and a defendant is entitled to have the jury consider any fact that may have been influenced the witness’ testimony.” *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995)(citation omitted). Evidence may be admitted to assist in the evaluation of the credibility of a witness. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). “If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact.” *Id.*

The issue becomes whether trial counsel should have objected to the prosecutor’s questioning concerning the letters. We cannot ascertain from the record the substance or source of the letters, nor for that matter can we even determine the existence of the letters, beyond the testimony of Cooper and Elder.<sup>4</sup> Trial counsel’s objection to the prosecutor’s discussion of the letters in closing argument, on the basis that there was no showing that the letters were threatening, suggests to us that counsel was fully aware of the existence of letters and the substance of the letters. Not drawing further attention to potentially damaging letters and threats, including possible concerns that the letters could be admitted into evidence or delved into in far greater detail, could clearly be a matter of exercising sound trial strategy. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995)(“Certainly there are times when it is better not to object and draw attention to an improper comment.”). We find that defendant has failed to overcome the presumption that counsel’s decision not to object constituted sound trial strategy. Moreover, assuming that trial counsel should have objected, we cannot conclude that there was a

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<sup>3</sup> Defendant’s argument that reference to the letters and threats constituted hearsay lacks merit. The prosecutor was not attempting to prove the truth of the matter asserted in any letter or threat but merely trying to show that threats were received and the impact of threats on the witnesses’ testimony. MRE 801(c). Moreover, the prosecutor’s questioning was not leading as argued by defendant. Further, defendant cites no authority for the proposition that the letters were required to be entered into evidence.

<sup>4</sup> We note that Cooper’s testimony indicates that a threat was also conveyed verbally to him through an acquaintance of Cooper’s brother.

reasonable probability that, but for counsel's error, the result of the proceeding would have been different. The prosecutor's reference to the threats was not extensive and nonspecific, and did not directly elude to the source of the threats. With that in mind, and considering the direct evidence of defendant's identification as the gun-toting individual in the restaurant the night of the crime as established by Miller's testimony, along with strong circumstantial evidence of defendant's guilt, defendant was not prejudiced.

Defendant next argues that he was denied effective assistance of counsel with respect to the prosecutor's reference, during closing rebuttal argument, to the letters and suggestion that Cooper and Elder may have been cloudy on their identification of defendant because of threats. Defendant maintains that the prosecutor's comments were improper and not based on evidence presented at trial, and that trial counsel should have objected and moved for a mistrial.

Generally, prosecutors are accorded great latitude regarding their arguments and conduct. *People v Knapp*, 244 Mich App 361, 381-382 n 6; 624 NW2d 227 (2001). Further, prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Id.*

We first note that there was evidence of threats predicated on the responses given by Cooper and Elder, although there were no letters introduced into evidence. For the same reasons given previously in support of our ruling regarding the ineffective assistance claim and the prosecutor's questioning of witnesses, we find that defendant fails to overcome the presumption that counsel's action or inaction constituted sound trial strategy and fails to show prejudice.

Next, defendant argues that trial counsel was ineffective for failing to object to the trial court's refusal to rule on the prosecutor's motion in limine regarding Miller, failing to request a ruling at the time Miller testified, and failing to request an evidentiary hearing on Miller's state of mind and use of medications. Defendant states:

Defendant is not claiming that there was information that would have assisted him in his defense, nevertheless, to forfeit the chance to gather pertinent information, in order to subject the adversarial case to a meaningful testing process constitute a denial of due process . . . .

First, we see no reason or purpose for trial counsel to object to the trial court's determination to take the prosecutor's motion under advisement until trial and Miller's appearance to testify. Second, with respect to counsel's failure to raise the issue at trial during Miller's testimony, we fail to see the relevance of the information concerning Miller's apparent breakdown as that information was described by the prosecutor to the trial court. His breakdown could be viewed as supporting the prosecution's contention that Miller observed a traumatic event and make the jury feel sympathetic towards Miller. Third, in regard to a failure to request an evidentiary hearing on the matter, defendant himself states that there is no claim that pertinent information would have been forthcoming. Further, based on Miller's demeanor at trial and his competence in answering questions, trial counsel may simply have decided it was best not to broach the subject of Miller's apparent breakdown following the shooting. We question whether, assuming Miller remained on medication and was suffering from anxiety or depression at the time of his testimony, the information would have been pertinent to Miller's recollection of events surrounding the shooting, where there is no indication that he was on medication or

suffering a psychiatric disability when the shooting occurred. We conclude that defendant fails to overcome the presumption that counsel's action or inaction constituted sound trial strategy and fails to show prejudice.

Finally, in the context of defendant's ineffective assistance claims, he argues that the prosecutor improperly commented on defendant's right to remain silent, which comment should have been objected to by defense counsel. The prosecutor stated in closing: "Now, I don't know if you've been able to watch Mr. McClure while this case has been going on, but I noticed he's been sitting there acting like he's bored." We find that the prosecutor's comment does not equate to a comment or argument concerning defendant's right to remain silent. Any objection would have been futile; therefore, there is no basis to support a claim of ineffective assistance of counsel. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

#### B. Prosecutorial Misconduct

Defendant argues that the prosecutor committed misconduct by referencing the threats and letters during closing argument and by indicating that Cooper's and Elder's inability to positively identify defendant was affected by the threats. Defendant maintains that there was no evidence to support the prosecutor's comments as the letters were not admitted into evidence and Cooper and Elder both testified that their testimony was not affected by the threats. Additionally, defendant complains that the prosecutor improperly indicated that Cooper's and Elder's testimony confirmed Miller's identification of defendant.

The test for prosecutorial misconduct is whether a defendant was denied his right to a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). As noted earlier, prosecutors are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Knapp, supra* at 381-382 n 6.

There was evidence presented, through the testimony of Cooper and Elder, that threatening letters and threats were received; therefore, the prosecutor's comments during closing were proper. Moreover, despite Cooper's and Elder's testimony to the contrary, a reasonable inference could arise, from the evidence indicating that threats were made, that the failure to positively identify defendant was because of the threats, especially in Elder's case where her trial testimony was an almost complete retreat from statements made to police which were damaging to defendant. Finally, with respect to the comments that Cooper and Elder confirmed Miller's identification of defendant, we conclude that the prosecutor was simply indicating that Cooper and Elder confirmed that the "tall" guy was not the shooter; the shorter male was the shooter. Reversal is not warranted.

#### C. Evidentiary Issues

Defendant argues that the trial court committed error by taking the motion in limine under advisement and by failing, sua sponte, to exclude or bar questioning, testimony, and references regarding the threatening letters.

A trial court's decision to admit or exclude evidence is reviewed by this Court for an abuse of discretion. *Knapp, supra* at 377. If the decision to admit evidence involves a question



of law, this Court reviews the issue de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

With regard to the motion in limine, there was no error where the trial court merely took the motion under advisement and neither party sought a ruling when Miller testified. Defendant cites no relevant authority to support his position that a ruling was required. Further, as to the threatening letters, we find no plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Thus, reversal is not warranted.

Affirmed.

/s/ Bill Schuette

/s/ William B. Murphy

/s/ Richard A. Bandstra